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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT COURT OF CALIFORNIA

LOWELL LABERTEW, an individual; and SANDRA LABERTEW, an individual,

Plaintiff,

v.

C&R FINANCIAL, INC., an entity of unknown form; GOLDEN EMPIRE MORTGAGE, INC., dba CIB FUNDING, a California Corporation; RAYMOND JACOB ROSZKOWICZ, an individual; RICK WILKES, an individual; BEVERLEE WILKES, an individual; and DOES 1-10, inclusive,

Defendants,

RICK WILKES, an individual; and BEVERLEE WILKES, an individual,

Cross-Complainant,

v.

C&R FINANCIAL, INC., an entity of unknown form; GOLDEN EMPIRE MORTGAGE, INC., dba CIB FUNDING, a California Corporation; RAY ROSZKOWICZ, an individual; LOWELL LABERTEW, an individual; SANDRA LABERTEW, an individual; and ROES 1-50, inclusive,

Cross-Defendants.

Case No. 07cv2092W (LSP)

Action Date: 10/31/07

Trail Date: None Set

BEVERLEE WILKES and RICK WILKES ANSWER TO COUNTER-CLAIM

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GOLDEN EMPIRE MORTGAG,INC. a California Corporation dba CIB FUNDING,

Counter-Claimant,

v.

LOWELL LABERTEW, an individual; SANDRA LABERTEW, an individual; C&R FINANCIAL, INC., a resigned California corporation; RAYMOND JACOB ROSZKOWICZ, an individual; RICK WILKES, an individual; BEVERLEE WILKES, an individual, and MOES 1-10, inclusive,

Cross-Defendants.

COMES NOW RICK WILKES and BEVERLEE WILKES (hereinafter collectively referred to as “Counter-Defendant”) in answer to the Counter-Claim filed by GOLDEN EMPIRE MORTGAGE, INC. a California Corporation dba CIB FUNDING (hereinafter referred to as “Counter-Claimant”), on their own behalf and on behalf of all persons similarly situated, and allege as follows:

1. In Answer to paragraph 1, Counter-Defendant admits Counter-Claimant’s allegations as true.

2. In Answer to paragraph 2, Counter-Defendant admits Counter-Claimant’s allegations as true.

3. In Answer to paragraph 3, Counter-Defendant specifically denies Counter-Claimant’s allegations as they have been unable to procure any evidence in support of the allegations contained therein.

4. In Answer to paragraph 4, Counter-Defendant admits Counter-Claimant’s allegations as true.

5. In Answer to paragraph 5, Counter-Defendant admits Counter-Claimant’s allegations as true.

6. In Answer to paragraph 6, Counter-Defendant generally and specifically deny Counter-Claimant’s allegations as they have no information or belief concerning the allegations at this time and are unable to admit the truth of any such allegations contained therein.

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7. In Answer to paragraph 7, Counter-Defendant admits Counter-Claimant's allegations as true.

8. In Answer to paragraph 8, Counter-Defendant admits Counter-Claimant's allegations as true.

9. In Answer to paragraph 9, Counter-Defendant admits Counter-Claimant's allegations as true.

10. In Answer to paragraph 10, Counter-Defendant admits Counter-Claimant's allegations as true.

11. In Answer to paragraph 11, Counter-Defendant incorporates herein by reference, as if fully set forth, each and every response contained in paragraphs 1 through 10 above.

12. In Answer to paragraph 12, Counter-Defendant generally and specifically deny Counter-Claimant's allegations as they have no information or belief concerning the allegations at this time and are unable to admit the truth of any such allegations contained therein.

13. In Answer to paragraph 13, Counter-Defendant incorporates herein by reference, as if fully set forth, each and every response contained in paragraphs 1 through 10 above.

14. In Answer to paragraph 14, Counter-Defendant generally and specifically deny Counter-Claimant's allegations as they have no information or belief concerning the allegations at this time and are unable to admit the truth of any such allegations contained therein.

15. In Answer to paragraph 15, Counter-Defendant incorporates herein by reference, as if fully set forth, each and every response contained in paragraphs 1 through 10 above.

16. In Answer to paragraph 16, Counter-Defendant generally and specifically deny Counter-Claimant's allegations as they have no information or belief concerning the allegations at this time and are unable to admit the truth of any such allegations contained therein.

FIRST AFFIRMATIVE DEFENSE

(Failure to State Facts Sufficient)

17. Counter-Defendant is informed and believes, and thereon alleges, that the Counter-Claim fails to state facts certain and/or sufficient to constitute a cause of action against this answering Counter-Defendant.

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SECOND AFFIRMATIVE DEFENSE

(Contributory Negligence)

18. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimant's alleged damages, if any, were wholly or partly contributed to or proximately caused by Counter-Claimant's conduct and activities, including Counter-Claimant's negligence and carelessness in the maintenance, control, utilization and repair of its property. Counter-Defendant is entitled to an equitable apportionment of the damages in relation to the negligence or wrongdoing of the Counter-Claimant.

THIRD AFFIRMATIVE DEFENSE

(Comparative Fault of Others)

19. Counter-Defendant is informed and believes, and thereon alleges, and upon such information and belief alleges, that the matters complained of in the Counter-Claim were caused, in whole or in part, by the acts or omissions of third parties other than this answering Counter-Defendant, and that any liability found against this answering Counter-Defendant must be reduced by the percentage of fault found to apply to said third parties.

FOURTH AFFIRMATIVE DEFENSE

(Intervening and Superseding Causes)

20. Counter-Defendant is informed and believes, and thereon alleges, that if Counter-Claimant was injured or suffered any loss, which Counter-Defendant denies, that any such injury and/or loss was the proximate cause of the intervening and superseding actions on the part of Counter-Claimant or other parties other than this answering Counter-Defendant and that, by virtue of the intervening and superseding fault, any recovery against this answering Counter-Defendant must be reduced in percentage to the amount of said fault.

FIFTH AFFIRMATIVE DEFENSE

(Estoppel)

21. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimant, by its' own conduct, is equitably estopped from asserting any right to recovery as against this answering Counter-Defendant.

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SIXTH AFFIRMATIVE DEFENSE

(Statutes of Limitations)

22. Counter-Defendant is informed and believes, and thereon alleges, that the Counter-Claim, and each and every purported cause of action contained therein, is barred, either wholly or in part, by the statute of limitations set forth in the California Code of Civil Procedure including, but not limited to, Sections 337, 337.1, 337.15, 338, 339, 340, 342 and 343.

SEVENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

23. Counter-Defendant is informed and believes, and thereon alleges, that if Counter-Claimant suffered a loss or damage, which this answering Counter-Defendant denies, then Counter-Claimant failed to exercise reasonable care and diligence to avoid that loss, if any, or minimize the resulting damage, if any, and cannot recover for said loss or damage beyond that which would have resulted from a reasonable mitigation.

EIGHTH AFFIRMATIVE DEFENSE

(Warranty Limitation)

24. Counter-Defendant is informed and believes, and thereon alleges, that if it is found that this answering Counter-Defendant made a warranty, express or implied, which this answering Counter-Defendant denies, then such warranty, if any, was disclaimed, excluded and limited in all of its parts and in its entirety, explicitly and conspicuously, both orally and in writing, in words that plainly conveyed the meaning to the Counter-Claimant of such disclaimed exclusion and limitation and that such warranty, if any, was also excluded and modified by the course of dealing and usage of the trade, all as to preclude Counter-Claimant from reliance upon or recovery from said warranty.

NINTH AFFIRMATIVE DEFENSE

(Lack of Capacity and/or Standing to Sue)

25. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimant lacks the capacity and/or standing to sue which bars the Counter-Claim.

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TENTH AFFIRMATIVE DEFENSE

(Lack of Privity)

26. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimants' lack of privity with Counter-Defendant bars the Counter-Claim including, but not limited to, any alleged warranty claims by Counter-Claimant which do not apply in the context of the present litigation.

ELEVENTH AFFIRMATIVE DEFENSE

(Acts of God)

27. Counter-Defendant is informed and believes, and thereon alleges, that any and all events, happenings, injuries or damages, if any, alleged in the Counter-Claim were a direct result of an Act of God.

TWELFTH AFFIRMATIVE DEFENSE

(Misuse of Products)

28. Counter-Defendant is informed and believes, and thereon alleges, that any and all events, occurrences, injuries and damages, if any, as alleged by the Counter-Claimant were proximately caused or contributed to by the products in question having been used in a non-intended or abnormal manner, and not as a result of any defects in, or failure of, said products or any of their component parts.

THIRTEENTH AFFIRMATIVE DEFENSE

(Waiver)

29. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimant has engaged in conduct and activities sufficient to constitute a waiver of any alleged breach of contract, negligence, or any other conduct, if any, as set forth in the Counter-Claim.

FOURTEENTH AFFIRMATIVE DEFENSE

(Assumption of the Risk)

30. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimant expressly, voluntarily and knowingly assumed all risks about which it complains in its Counter-Claim, and is therefore, barred either totally or to the extent of said assumption from

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recovery of any damages.

FIFTEENTH AFFIRMATIVE DEFENSE

(Laches)

31. Counter-Defendant is informed and believes, and thereon alleges, that each and every one of Counter-Claimant's causes of action are barred by the doctrine of laches.

SIXTEENTH AFFIRMATIVE DEFENSE

(Untimely Notice)

32. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimant has failed to give timely and proper notice to Counter-Defendant which therefore bars the Counter-Claim.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Collateral Estoppel and Res judicata)

33. Counter-Defendant is informed and believes, and thereon alleges, that the Counter-Claim and each and every purported cause of action contained therein is barred either wholly or in part by the doctrines of collateral estoppel and res judicata.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

34. Counter-Defendant is informed and believes, and thereon alleges, that the doctrine of unclean hands bars the Counter-Claim.

NINETEENTH AFFIRMATIVE DEFENSE

(Consent)

35. Counter-Defendant is informed and believes, and thereon alleges, that the conduct of Counter-Defendant was with Counter-Claimant's consent which bars the Counter-Claim.

TWENTIETH AFFIRMATIVE DEFENSE

(State of the Art)

36. Counter-Defendant is informed and believes, and thereon alleges that the product was "state of the art" and/or constructed with "state of the art" technology at the time it was manufactured and not defective in any legally actionable respect.

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TWENTY-FIRST AFFIRMATIVE DEFENSE

(Civil Code § 1430-1442)

37. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimant is barred by the provisions of Civil Code § 1430-1442.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Civil Code § 1375)

38. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimant's Counter-Claim is barred and is procedurally deficient as not being in compliance with Civil Code § 1375.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Counter-Claimant's Active Negligence)

39. Counter-Defendant is informed and believes, and thereon alleges, that the Counter-Claim, and each and every cause of action therein, is barred by the active negligence of the Counter-Claimant as compared to the passive actions of Counter-Defendant.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Full Disclosure)

40. Counter-Defendant is informed and believes, and thereon alleges, that it disclosed all relevant information pertaining to the subject property to the Counter-Claimant.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Civil Code §3343)

41. Counter-Defendant is informed and believes, and thereon alleges, that Counter-Claimant is limited by, barred by and/or subject to the provisions of Civil Code §3343.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Lack of Consideration)

42. This answering Counter-Defendant is informed and believes and on that basis alleges that Counter-Claimant's Counter-Claim and separate causes of action therein are barred for lack of consideration.

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TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Release)

43. This answering Counter-Defendant is informed and believes that Counter-Claimant has released this answering Counter-Defendant from liability associated with damages arising from various claims asserted in Counter-Claimant's Counter-Claim.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(No Breach of Warranties)

44. This answering Counter-Defendant is informed and believes and based thereon alleges that it did not breach any warranties, express or implied, and that no warranties, express or implied, arose in the instant situation.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Standard of Care)

45. This answering Counter-Defendant alleges that Counter-Claimant is barred and precluded from any recovery in this action because this answering Counter-Defendant at all times complied with the applicable standard of care required of this answering Counter-Defendant, at the time and location where the services were rendered.

THIRTIETH AFFIRMATIVE DEFENSE

(Failure to Notify)

46. This answering Counter-Defendant is informed and believes and based thereon alleges, that if any defects or inadequacies in the work performed by this answering Counter-Defendant, which this Counter-Defendant denies, Counter-Claimant failed to timely notify this Counter-Defendant of such condition and failed to give this Counter-Defendant timely opportunity to cure such conditions. Furthermore, this answering Counter-Defendant is informed and believes and on that basis alleges, that at no time prior to the filing of this action, neither Counter-Claimant or any agent, representative or employee(s) thereof, notified this Counter-Defendant of any breach of any contract, warranty or duty to Counter-Claimant. By reason of said failure to notify, Counter-Claimant is barred from any alleged right of recovery from this answering Counter-Defendant. This conduct by Counter-Claimant bars it from any relief from this answering

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Counter-Defendant herein.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Ambiguity)

47. This answering Counter-Defendant is informed and believes, and thereon alleges that the terms of the alleged agreement are ambiguous. Counter-Claimant knew, or had a reason to know, that the terms were ambiguous, but failed to disclose this fact to this answering Counter-Defendant.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Unconscionable)

48. This answering Counter-Defendant is informed and believes, and thereon alleges that the agreements alleged in Counter-Claimant's Counter-Claim are unconscionable, thereby rendering them invalid and unenforceable.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(No Privity of Contract)

49. This answering Counter-Defendant is informed and believes, and thereon alleges that, at all times mentioned in the Counter-Claim herein, Counter-Claimant and this answering Counter-Defendant were not in privity of contract.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(Good Faith)

50. This answering Counter-Defendant is informed and believes, and thereon alleges that at all times mentioned herein, this answering Counter-Defendant acted reasonably and in good faith with regard to the acts and transactions which are the subject of Counter-Claimant's Counter-Claim.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(Outside Scope of Agency)

51. That any wrongful acts, as alleged by Counter-Claimant on the part of other Counter-Defendants were not performed within the course and scope of any agency or relationship with this answering Counter-Defendant and were not ratified by this answering Counter-

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Defendant.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

(Misuse of Products)

52. This answering Counter-Defendant is informed and believes, and thereon alleges, that any and all events, occurrences, injuries and damages, if any, as alleged by the Counter-Claimant were proximately caused or contributed to by the products in questions having been used in a non-intended or abnormal manner, and not as a result of any defects in, or failure of, said products or any of their component parts.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

(No Attorneys' Fees)

53. That Counter-Claimant has failed to allege any basis which would entitle Counter-Claimant to reimbursement of attorney's fees allegedly incurred in this litigation. No such basis exists, no contract for attorneys' fees exists between Counter-Claimant and Counter-Defendant exists, and Counter-Claimant is not entitled to reimbursement.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

(Costs)

54. This answering Counter-Defendant is informed and believes and thereon alleges that the Counter-Claim was brought without reasonable cause and without a good faith belief that there was a justifiable controversy under the facts or the law which warranted the filing of the Counter-Claim against this answering Counter-Defendant. Counter-Claimant should therefore be responsible for all Counter-Defendant's necessary and reasonable defense costs, as more particularly set forth in the California Code of Civil Procedure Section 128.5.

THIRTY-NINTH AFFIRMATIVE DEFENSE

(Conduct Was Justified)

55. The conduct of this answering Counter-Defendant in regard to the matters alleged in the Counter-Claim were justified, and by reason of the foregoing, Counter-Claimant is barred from any recovery against Counter-Defendant herein.

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FORTIETH AFFIRMATIVE DEFENSE

(Complete Performance)

56. This answering Counter-Defendant has appropriately, completely and fully performed and discharged any and all obligations and legal duties arising out of the matters alleged in the Counter-Claim.

FORTY-FIRST AFFIRMATIVE DEFENSE

(Reservation)

57. Counter-Defendant presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated affirmative defense available. Counter-Defendant reserves herein the right to assert additional defenses in the event that the discovery indicates that they would be appropriate.

FORTY-SECOND AFFIRMATIVE DEFENSE

(Incorporation of Affirmative Defenses)

58. This answering Counter-Defendant incorporates herein by this reference as though fully set forth herein each and every one of the affirmative defenses asserted in answers on file to the Counter-Claim filed herein.

FORTY-THIRD AFFIRMATIVE DEFENSE

(Attorneys' Fees)

59. If it is determined that a contract exists between Counter-Claimant and Counter-Defendant entitling one to attorneys' fees, Counter-Defendant is entitled to reimbursement for attorneys' fees and costs incurred by Counter-Defendant in this litigation pursuant to said agreement entered into between Counter-Defendant and Counter-Claimant.

FORTY-FOURTH AFFIRMATIVE DEFENSE

(No Agency Relationship)

60. That at all times mentioned in the Counter-Claim herein, no agency, servant or employee relationship existed between this answering Counter-Defendant and the remaining Counter-Defendants or cross-Counter-Defendants.

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FORTY-FIFTH AFFIRMATIVE DEFENSE

(Excused Obligations)

61. As and for a separate and forty-fifth affirmative defense, Counter-Defendant alleges that, to the extent that Counter-Claimant's Counter-Claim is based upon a cause of action for breach of contract or agreement by Counter-Defendant, Counter-Defendant's performance is excused and Counter-Claimant's recovery is barred, by the doctrines of failure of consideration, impossibility of performance, frustration of purpose, interference with performance, unconscionability, adhesion, fraud, duress and/or breach of condition.

FORTY-SIXTH AFFIRMATIVE DEFENSE

(Lack of Maintenance)

62. As and for a separate and forty-sixth affirmative defense, Counter-Defendant alleges that Counter-Claimant and/or other third parties failed to perform that degree of maintenance on the work of improvement installed by this answering Counter-Defendant as was necessary to protect such work of improvement from deterioration from the elements, wear and tear, and/or other factors, thus barring or otherwise diminishing the amount of recovery, if any, as against this answering Counter-Defendant.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

(Acceptance)

63. As and for a separate and forty-seventh affirmative defense, Counter-Defendant alleges that Counter-Claimant herein accepted and approved the work, acts and/or omissions, if any, of this answering Counter-Defendant.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

(Ratification)

64. As and for a separate and forty-eight affirmative defense, Counter-Defendant alleges that Counter-Claimant ratified all acts and/or omissions, if any, of this answering Counter-Defendant, thereby barring Counter-Claimant from any recovery as against this answering Counter-Defendant.

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FORTY-NINTH AFFIRMATIVE DEFENSE

(Spoilation)

65. As and for a separate and forty-ninth affirmative defense, Counter-Defendant alleges that Counter-Claimant, Counter-Claimant's agents, contractors, and/or other third parties have intentionally and/or negligently permitted spoilation of evidence integrally necessary to properly and thoroughly litigate this action, thereby resulting in irreparable injury and prejudice to this answering Counter-Defendant's ability to defend itself in this matter, and thus estopping Counter-Claimant's claim as against this answering Counter-Defendant.

FIFTIETH AFFIRMATIVE DEFENSE

(Indispensable Parties)

66. As and for a separate and fiftieth affirmative defense, Counter-Defendant alleges that the purported claims and causes of action contained in the Counter-Claim require for their full, final and complete resolution and adjudication, in the presence of additional necessary and/or indispensable parties that are not participating in this action, thereby prejudicing this answering Counter-Defendant such that any recovery by Counter-Claimant as against this answering Counter-Defendant should be barred or diminished.

FIFTY-FIRST AFFIRMATIVE DEFENSE

(Misjoinder)

67. This answering Counter-Defendant is informed and believes, and thereon alleges, that the Counter-Claim on file herein, and the whole thereof, including each and every purported cause of action contained therein, is in violation of California Code of Civil Procedure §378 and the law of joinder and therefore contains a misjoinder of Counter-Claimant.

DATED: April 15, 2008

Geraci Law Firm, APC

/s/ Christina L. Geraci

Christina L. Geraci,
Anthony F. Geraci
Attorneys for Counter-Defendant, BEVERLEE WILKES and RICK WILKES